United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

604

BRIEF FOR APPELLANT WOODARD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,108

6676

JOHN E. WOODARD, JR.,

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

Appeal From A Judgment And Order Of The
United States District Court For
The District of Columbia

Richard S. T. Marsh
Donald B. Robertson

Ross, Marsh & Foster
725 - 15th Street, N.W.
Washington, D.C. 20005

Counsel for Appellant
Appointed by This Court

QUESTIONS PRESENTED

In the opinion of Appellant Woodard, the following questions are presented:

1. Did the District Court err in failing to suppress a fingerprint and other evidence obtained following a daytime arrest without a warrant before the arresting police officer had received any report of the alleged crime under the circumstances of this case which found Appellants at and around a safe in a wooded area?

2. Assuming, arguendo, that the arrest was lawful, did the District Court err in failing to suppress a fingerprint and other evidence obtained during the detention following the arrest at 3:00 p.m. on a Saturday evening, when the Appellants were not fingerprinted until after midnight that evening, were not booked until after 2:00 a.m. Sunday morning, and were not taken before a committing magistrate until the following Monday?

3. Did the trial court commit plain error in giving the instruction to the effect that the jury may infer guilt from Appellants' "unexplained" possession of recently stolen goods:

a. Where Appellant did not waive his constitutional right to remain silent without any inference of guilt being attached thereto and offered no "explanation" evidence; and

b. Where the trial court failed to instruct that such possession must have been exclusive and that, where shared

possession is involved, concerted action is required?

4. May a conviction for grand larceny be based, as to the value of the articles stolen, solely upon the complaining witness' testimony as to the contents of a safe which he admits he had not opened for at least a week before the alleged crime, when there is no evidence that no other person had access to the safe for such one-week period, and when the complaining witness failed to identify the contents of the safe when it was recovered still in an unopened condition?

I N D E X

TABLE OF CONTENTS

TABLE OF CASES

Cases:

*Cases and Authorities chiefly relied upon.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,103

JOHN E. WOODARD, JR.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

BRIEF FOR APPELLANT WOODARD

I

JURISDICTIONAL STATEMENT

This is an appeal from a conviction for housebreaking and grand larceny. Appellant is proceeding in forma pauperis pursuant to orders of the District Court dated March 4 and 24, 1966. The jurisdiction of the court is invoked under the provisions of 23 U.S.C. §§ 1291-1292.

II

STATEMENT OF THE CASE

Procedural Background

The Appellant Woodard was arrested at 3:00 p.m. on Saturday, June 5, 1965, booked after 2:00 a.m. on Sunday, June 6, 1965, and finally taken before a committing magistrate on Monday, June 7, 1965. He waived a preliminary hearing and was bound over for the Grand Jury. On July 6, 1965, an indictment issued charging Appellants[1/] and another, one Hardy, each with housebreaking and grand larceny.

Following the appointment of counsel on July 21, 1965, Appellant Woodard pleaded not guilty on July 23, 1965.

On July 23, 1965, the Appellant Johnson, through his counsel, filed a "Motion to Dismiss Indictment or, Alternatively, to Suppress Evidence and Request for Hearing," together with a "Motion for a Bill of Particulars."[2/] The motion to suppress was based on the grounds, inter alia, that Appellants' arrest was unlawful and that they were not taken before a committing magistrate without unreasonable delay, as required by Rule 5(a) of the Federal Rules of Criminal Procedure.

1/ "Appellants" refers to the Appellant herein and Melvin A. Johnson, the Appellant in No. 20,109 which was consolidated herewith by order of this court dated June 14, 1966.

2/ The latter motion appears never to have been acted upon.

The motion to suppress was not heard until December 20, 1965, when it was denied by then Chief Judge Matthew F. McGuire (M/S[3] Tr. 19). Immediately thereafter the case was transferred to Judge Richmond B. Keech for trial.[4] During trial, Appellant Johnson renewed his motion to suppress, joined by Appellant Woodard, but it was again denied (Tr. 163, 172). Appellants also moved for a judgment of acquittal on the ground that there had been insufficient proof that the value of any property stolen was $100 or more (Tr. 167, 172). The latter motion was denied (ibid.).

On December 21, 1965, following trial, the jury returned a verdict of guilty on both counts as to both Appellants and Hardy. On February 25, 1966, the Appellant Woodard was sentenced, on each count, to serve not less than one nor more than five years in prison, the sentences to run concurrently.

3/ "M/S" refers to the transcript of the testimony at the hearing on the motion to suppress on December 20, 1965.

4/ Following his arrest, Appellant Woodard was released on bond on June 9, 1965. That bond was revoked on July 9, 1965, when Appellant was late for a court appearance. Thereafter, on August 10, 1965, Appellant moved for his release on personal recognizance or, in the alternative, to have his previous bond reinstated. The motion was granted on August 17th, and bond was set at $500. Thereafter, on August 27th Appellant moved to set bond without a surety. The latter motion was denied on September 3rd, as was a later motion for release on personal recognizance, on November 9th. Accordingly, Appellant remained incarcerated during the entire period from July 9, 1965, until trial.

The judgment and commitment were entered on February 25, 1966, and the Appellant Woodard noted an appeal on March 7, 1966. On March 4, 1966, an order had been issued by the trial court authorizing the Appellant Woodard to proceed on appeal without the pre-payment of costs and directing that the transcript of the testimony of the witnesses at trial be prepared at government expense. Thereafter, on March 24, 1966, another order was issued by the trial court directing that the transcript of the closing argument of the government and the court's charge to the jury also be prepared at government expense.

On June 14, 1966, as we have noted, an order was issued by this court consolidating this case with No. 20,109, Johnson v. United States, an appeal by one of Appellant Woodard's co-defendants below. On July 1, 1966, Appellants requested this court to order the preparation of the transcripts of certain additional proceedings in the court below. On July 13, 1966, the court issued an order directing the preparation of the requested supplemental record and extending the time for filing briefs. The supplemental record was filed on October 7, 1966, and February 14, 1967. On March 6, 1967, the court issued an order extending the time for Appellant

Woodard to file his brief until March 24, 1967.[5/]

Factual Background

The testimony of the prosecution witnesses[6/] would indicate the following factual background:

Robinson Place, S. E., is an unpaved horseshoe-shaped street that runs from 12th Place, S. E., approximately two blocks down to a wooded area, and back to 12th Place (Tr. 97-98). On June 5, 1965, one Pamela Collins, a sixteen-year-old girl, was walking down Robinson Place in the company of several friends.[7/] An automobile came down the road behind them (Tr. 52-53). It passed them, made a turn at the end of the road, and stopped (Tr. 53). Four boys got out of the

---

5/ Meanwhile, on motion of Appellant Woodard, the court issued an order on November 18, 1966, authorizing his release on bond on certain stated conditions. On November 30, 1966, the Appellant Woodard was released on bond, pending this appeal, pursuant to the terms of the foregoing court order, and he has remained on bond to this date.

6/ The Appellant was tried together with Hardy and Appellant Johnson. None of the defendants testified at trial, although Appellant Johnson testified on the pre-trial motion to suppress.

7/ Miss Collins stated that she was in the company of four other boys and girls (Tr. 51-52), none of whom testified at the trial, although at least one was subpoenaed by the government. Pamela was unclear as to the time. Although she testified that it was before her usual 5 p.m. dinner hour, and may have been as early as 4:30 p.m., she also testified that it could have been later (Tr. 51, 64, 81-83, 88-89, 91-92).

main body of the automobile and a fifth boy from the trunk (Tr. 54, 66). They then pulled something out of the trunk, placed it on the ground, then lifted it several feet away and leaned it against a tree, and threw a mattress over the top of it (Tr. 54-55, 74). Although Pamela and her companions continued to walk in the general direction of the boys, they never came closer than the length of the courtroom (Tr. 65), and she was unable to identify the object taken out of the car (Tr. 69, 90).

Thereafter, two of the boys got back in the car, turned it around, and proceeded back up Robinson Place (Tr. 55). The other three boys, whom Pamela did not know but has subsequently identified as Appellants and Hardy, stood around for a while, and then went and sat on a log (Tr. 55). By this time, Pamela and her friends were approaching the horseshoe end of Robinson Place and, as they started around, one of the boys began throwing rocks at them (Tr. 55-56). Pamela and her companions either ran back up the road (Tr. 56) or into the woods (Tr. 58). The children then happened on to a police car driven by park policeman Cooper, and they talked to him (Tr. 58-59).

As a result of his conversation with the children, Officer Cooper followed them to the end of Robinson Place (Tr. 99). When he arrived, he observed Hardy and the Appellants "attempting to cover something with an old bed mattress

and a woolen blanket" (Tr. 99-100). The object that the boys were attempting to cover was on the ground beside the road (Tr. 100). As Officer Cooper approached, Hardy ran into the wooded area, and Appellants sat down on the mattress (Tr. 100). Officer Cooper testified that he continued past the boys, around the bend of the horseshoe, and looked for a vehicle (Tr. 100-101). Not finding a vehicle, the officer backed his cruiser up to Appellants who were then sitting on a log approximately one hundred feet from where the officer had first observed them (Tr. 101). As he approached, Hardy again went into the woods but reappeared in a few minutes and, together with Appellants, talked to the officer (Tr. 101). During the course of the conversation, Officer Cooper asked the boys to show identification, which they did willingly (Tr. 119). He testified that they cooperated in every way (Tr. 119). Before the officer had completed his conversation with the boys, an older brother of one of Pamela's companions came to the scene, picked the children up, and took them home. (Tr. 80-81, 120).

After completing his conversation with the boys, Officer Cooper went back to the location of the mattress and the blanket (Tr. 101). As he approached, he noticed that the mattress and blanket partially covered a safe (Tr. 101-102). On the ground, beside the safe, were a screwdriver and a lug wrench (Tr. 101-102). The safe was about two feet wide, two feet long, and three feet tall (Tr. 104). Officer Cooper testified that there was a metal plate on the bottom

of the safe that had been partially torn off, and that the concrete under the plate appeared to have been chiseled (Tr. 107). The safe was unopened (Tr. 107).

Officer Cooper had been at the safe for approximatley two or three minutes when he turned around to look for the boys and found that they had gone into the woods (Tr. 102, 120, and 121). He then went to his cruiser, reported to the radio dispatcher what he had observed, asked for some assistance, and told the dispatcher he was looking for the three boys (Tr. 121).

After devoting approximately eight or ten minutes to reporting and enlisting assistance (Tr. 122), Officer Cooper saw Hardy run into the woods, followed him, and found Appellants sitting on the ground at the edge of the woods, approximately 250 feet from the safe (Tr. 122-123). At that point, Officer Cooper asked the boys to come with him, and they did (Tr. 123), although he had received no reports of a missing safe and had no knowledge that any crime involving a safe had been committed (Tr. 128-130). He first took them to a point about midway between his cruiser and the safe (Tr. 124). Then he led them to his cruiser and radioed the dispatcher to request a check of the teletype to see if there were any reports that a safe had been stolen (Tr. 124). By this time, in Officer Cooper's estimate, it was 3:00 p.m. (Tr. 128). Officer Cooper recalls that he told Appellant Woodard not to go away (Tr. 127).

Shortly thereafter, several Metropolitan Policemen arrived (Tr. 129), and the boys were searched (Tr. 125-127). Finally, Officer Cooper testified, between 8:15 and 8:30 p.m., he received a report through the Metropolitan Police that a housebreaking had been reported and a safe similar to the one he had observed was reported missing (Tr. 128-129).

It appears that, at approximately 7:35 p.m., the complaining witness returned to his appartment with his wife (Tr. 23). When they reached the door and unlocked it, they found the chain for the security lock had been cut (Tr. 23-24). Upon entering, they discovered the furniture askew and a Victor safe, a watch, a string of pearls, several new men's shirts, a pair of men's walking shorts, a small Zenith transistor pocket radio, and an electric blanket were missing (Tr. 25-27, 30-31).

The complaining witness had purchased the electric blanket for $29 approximately two weeks before (Tr. 31-32). The only other evidence of the value of the missing items related to the contents of the safe, in which the complaining witness appears to have kept personal papers, deeds, and cash (Tr. 26). According to his testimony, he placed $200 in the safe about two weeks before the crime (Tr. 26), and, about a week later, took one $10 bill out (Tr. 26). On this basis alone he testified that the safe contained $270, plus about six or eight silver dollars, some odd change, and a bunch of old coins, on the morning of the crime (Tr. 26-27). On cross-examination, however, he admitted that he had not opened the

safe that morning and, "truthfully," that he could not remember the last time he had opened it and looked in, but estimated that it had been a week before (Tr. 39-40). Similarly, although the safe was returned to the complaining witness several days later, still locked, and he removed the contents, he did not state what those contents were (Tr. 43).

Shortly after discovering the condition of his apartment, the complaining witness was contacted by the police, and he reported the housebreaking and the missing items (Tr. 33). Subsequently, among a number of fingerprints discovered in the complaining witness' apartment, one was found that the police testified belonged to the Appellant Woodard (Tr. 147). The electric blanket and radio found in the wooded area were identified by the complaining witness as his (Tr. 29, 32), and he stated that several days after the alleged housebreaking he reclaimed his safe at the Municipal Center (Tr. 48), and removed the contents (Tr. 48).

The record is not entirely clear as to when or how the boys were transported to police headquarters, although Officer Cooper estimates that it was approximately 9:00 or 9:30 p.m. (Tr. 109-114, 124, 126-127, 131). In any event, although the arrest took place by approximately 3:00 p.m., they were not fingerprinted until after midnight (Tr. 133, 137), nor booked until after 2:00 a.m. on Sunday morning (Tr. 180-181). The boys were not taken before a committing magis-

trate until the following Monday, June 7, 1965, at which time they waived a preliminary hearing and were held for the grand jury.

III

STATUTES, TREATIES, REGULATIONS OR RULES INVOLVED

Constitution of the United States:

> Amendment V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

District of Columbia Code (1961 Ed.):

> § 22-1801. Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.
>
> § 22-2201. Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.
>
> § 22-2202. Whoever shall feloniously take and carry away any property of value of less than $100, including things savoring of the realty, shall be fined not more than $200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered.

United States Code (1958), as amended:

Title 18: § 3481. In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.

Federal Rules of Criminal Procedure:

Rule 5(a). Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

Rule 52(b). Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

IV

STATEMENT OF POINTS

1. The District Court erred in denying Appellants' motion to suppress certain evidence on the ground that it was obtained as the result of an unlawful arrest. The arresting officer had neither a warrant nor probable cause to believe that a felony had been committed and that the Appellants were guilty. (With respect to this point, Appellant Woodard desires the court to read the following pages of the transcript: M/S Tr. 1-20; Tr. 33, 58-59, 80-81, 90, 95-131.)

2. The District Court erred in denying Appellants' motion to suppress certain evidence on the ground that it was obtained during an illegal detention. Appellants were not taken before a committing magistrate without unreasonable delay as required by Rule 5(a) of the Federal Rules of Criminal Procedure. (With respect to this point, Appellant Woodard desires the court to read the following pages of the transcript: M/S Tr. 18-20; Tr. 33, 41, 109-114, 123-130, 131, 133-139, 180-181.)

3. The District Court committed plain error, under the circumstances of this case, in instructing the jury that an inference of guilt could be drawn from the "unexplained" possession of recently stolen property:

a. Because the court's reference to "unexplained" possession prejudicially focused the jury's attention on Appellants' decision not to testify and permitted it to infer

guilt therefrom, in contravention of Appellants' rights under the Fifth Amendment to the Constitution of the United States and 18 U.S.C. § 3481. (With respect to this point, Appellant Woodard desires the court to read the following pages of the transcript: Tr. 178-179, 233-234.)

b. Because the court failed to instruct the jury that such possession must be exclusive and that joint possession requires concerted action. (With respect to this point, Appellant Woodard desires the court to read the following pages of the transcript: Tr. 54, 55, 66, 233-234.)

4. The District Court erred in submitting the issue of grand larceny to the jury and in not overturning the jury's verdict of guilty on the grand larceny count on the ground that there was insufficient evidence that the total value of the articles allegedly stolen was $100 or more as required by § 22-2201 of the D. C. Code (1961 ed.). (With respect to this point, Appellant Woodard desires the court to read the following pages of the transcript: Tr. 25-27, 30-32, 39-40, 48, 107, 167, 172, 228-230.)

SUMMARY OF ARGUMENT

A. Appellants' Motion to Suppress Should Have Been Granted Because Their Arrest and Detention Were Unlawful

The arrest of the Appellants without a warrant was unlawful because the arresting officer had no probable cause to believe that a felony had been committed and that the Appellants had committed it. Moreover, regardless of the validity of the arrest, the detention of Appellants was illegal because they were not taken before a committing magistrate without unreasonable delay as required by Rule 5(a) of the Federal Rules of Criminal Procedure. As a consequence, all evidence obtained as a result of the arrest and detention, including specifically the fingerprint and radio, should have been suppressed.

With respect to the validity of the arrest, the police officer had no probable cause under the facts and circumstances known to him at the moment of the arrest to believe that a felony had been committed and that the Appellants were guilty. Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431 (1960); and Henry v. United States, 361 U.S. 98, 80 S.Ct. 168 (1959). A careful reading of the record, including that of the pre-trial hearing, shows that Officer Cooper obtained very little information from Pamela Collins and her companions and that most of the facts and circumstances testified to by Pamela must be disregarded for purposes of determining

probable cause at the moment of the arrest.

It is clear that the officer had received no report of a housebreaking or a missing safe (M/S Tr. 13). Nor does the record provide a sufficient description of the area in which the arrest was made, thereby making it extremely difficult to determine whether a given act should or should not give rise to suspicion. The record is also devoid of evidence as to why Officer Cooper believed that the safe did not belong to Appellants, that they had not merely come upon it, or that there was not some other satisfactory explanation for its presence. There is no suggestion in the record that Appellants failed to account satisfactorily for their presence, and the officer admitted that they willingly provided information and cooperated in every way. Similarly, the government failed to show that Officer Cooper even attempted to elicit information from the Appellants about their relationship to the safe or the reason it was there. The officer simply assumed guilt at the moment he discovered the safe.

Finally, the record makes clear that the officer could not possibly have had probable cause to believe that a felony -- as distinguished from a misdemeanor -- had been committed. Only guesswork could have led him to the conclusion that the property allegedly stolen was worth $100 or more, and such guesswork cannot be the requisite probable cause to justify an arrest without a warrant.

Since there was no probable cause to believe that Appellants had committed a felony, and since no misdemeanor was committed in the officer's presence, Maghan v. Jerome, 67 App.D.C. 9, 88 F.2d 1001 (1937), Appellants' arrest was unlawful, and the evidence obtained thereby, including Appellant Woodard's fingerprint, should have been suppressed. Bynum v. United States, 104 U.S.App.D.C. 368, 262 F.2d 465 (1959). The failure of the District Court to do so was reversible error.

Regardless of the validity of the arrest, however, Appellants' detention was illegal, and all evidence obtained thereby should have been suppressed. Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356 (1957); Gatlin v. United States, 117 U.S.App.D.C. 130, 326 F.2d 666 (1963); and Bynum v. United States, supra. Under the circumstances of this case, the detention of more than four hours prior to fingerprinting, more than six hours prior to booking, and more than 36 hours prior to the opportunity for a preliminary hearing, jointly and severally, constitute an unreasonable delay. Since evidence, including a fingerprint from Appellant Woodard, was obtained during these periods of illegal detention, it should have been suppressed, and Appellants were prejudiced by the District Court's failure to do so.

B. The Court's Instruction as to the Inference to Be Derived from the Possession of Stolen Goods Was Erroneous and Deprived Appellants of Their Rights under the Fifth Amendment

Under the circumstances of this case, the instruction given by the trial court to the effect that the unexplained possession of recently stolen property may give rise to an inference of guilt on the part of the possessors was erroneous and constituted plain error.

It is well established that every defendant in a criminal case has the absolute right not to testify and that no inferences adverse to the defendant may be drawn therefrom. The Constitution of the United States, Amendment V; 18 U.S.C. § 3481. In practical effect, however, the inference-from-possession instruction as given by the trail court here permitted the jury to draw an inference from the fact that Appellants did not testify. Since Appellants elected to stand on their constitutional right to remain silent and since the record shows no explanation by the Appellants for their alleged possession of certain alleged stolen property, the net effect of the "unexplained" language in the instruction was to focus unwarranted attention on the fact that Appellants did not testify. Accordingly, the instruction given by the trial court was improper and highly prejudicial.

Moreover, the instruction as given by the trial court was erroneous in that it failed to take into consideration that three separate defendants were on trial and that there was testimony that two additional persons recently

had also had connections with certain of the stolen property. Thus, the trial court erred in not instructing the jury that the possession necessary to raise an inference of guilt must be exclusive. See e.g., Trachtenberg v. United States, 53 App.D.C. 396, 293 F.476 (1923). Similarly, the trial court also erred in not instructing that where contact with the articles involved was shared with others, concerted action must be found on the part of all to raise an inference of guilt. Cf. United States v. Luciano, 343 F.2d 172 (4 Cir. 1965).

C. The Evidence of Value Was Insufficient Upon Which to Sustain a Conviction of Grand Larceny and the Court Erroneously Submitted the Issue to the Jury

Since there is evidence of value, in the amount of $29, with respect to only one other allegedly stolen article, whether or not grand larceny was proved must depend upon the contents of the safe. The complaining witness testified that he had not been in the safe for at least a week, and no showing was made that access was limited to him. Although the safe was recovered in a locked condition, there is no evidence as to the nature or value of its contents at the time of recovery. Accordingly, there was no showing that $71 or more were in the safe at the time of the alleged crime, and the government has failed to prove beyond a reasonable doubt that the property allegedly stolen was worth the requisite amount to obtain a conviction for grand larceny.

ARGUMENT

A. Appellants' Motion to Suppress Should Have Been Granted Because Their Arrest and Detention Were Unlawful.

As we show in detail below, the arrest of the Appellants without a warrant was unlawful because the arresting officer had no probable cause to believe that a felony had been committed and that the Appellants had committed it. We shall also show below that the detention of the Appellants was illegal because they were not taken before a committing magistrate without unreasonable delay as required by Rule 5(a) of the Federal Rules of Criminal Procedure. As a consequence, all evidence obtained as a result of the arrest and detention, including the fingerprint and the radio, should have been suppressed. The failure of the District Court to do so was highly prejudicial to Appellants and clearly constitutes reversible error.

1. The Arrest Was Illegal.

No discussion or extensive citation of authority is necessary for the proposition that all evidence obtained as the result of an unlawful arrest of a defendant in a criminal case is illegally obtained and must be suppressed. Henry v. United States, 361 U.S. 98, 80 S.Ct. 168 (1959). Similarly, it is well established that the criterion by which the lawfulness of an arrest without a warrant is

determined is whether the arresting officer had probable cause to believe that a felony has been committed and that the persons to be arrested committed it. Henry v. United States, supra. Moreover, whether or not probable cause for an officer to arrest without a warrant exists in a given case must be viewed through the eyes of the arresting officer at the moment of the arrest. Rios v. United States, 364 U.S. 253, 80 S.Ct. 1431 (1960).

As the Supreme Court has stated, probable cause is more than mere suspicion."[C]ommon rumor or report, suspicion, or even 'strong reason to suspect'" is not adequate to support a warrant for arrest. Henry v. United States, supra, 361 U.S. at 101, 80 S.Ct. at 170. In Henry, the Court set forth the guide lines for a warrantless arrest (361 U.S. at 102, 80 S.Ct. at 171):

> "Evidence required to establish guilt is not necessary. Brinegar v. United States, 338 U.S. 160, 69 S.Ct. 1302, 93 L.Ed. 1879; Draper v. United States, 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327. On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. Stacey v. Emery, 97 U.S. 642, 645, 24 L.Ed. 1035. And see Director General of Railroads v. Kastenbaum, 263 U.S. 25, 28, 44 S.Ct. 52, 53, 68 L.Ed. 146; United States v. Di Re, supra, 332 U.S. 592, 68 S.Ct. 227; Giordenello v. United States, supra, 357 U.S. 486, 78 S.Ct. 1250. It is important, we think, that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen. If the officer acts with probable cause, he is protected even though it turns out that the citizen is innocent. Carroll v. United States, 267 U.S. 132, 156, 45 S.Ct. 280, 286, 69 L.Ed. 543. And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest

> without a warrant is to support an incidental search, it must be made with probable cause. Carroll v. United States, supra, 267 U.S. at pages 155-156, 45 S.Ct. at pages 285-286. This immunity of officers cannot fairly be enlarged without jeopardizing the privacy or security of the citizen."

As the record in this case reveals clearly, Officer Cooper had no probable cause, at the moment he placed Appellants under arrest, to believe that a felony had been committed and that Appellants committed it. The facts and circumstances which the record reveals to have been known to Officer Cooper at the time he placed Appellants under arrest would not justify a prudent man in believing that an offense had been committed and that Appellants committed it.

At the hearing on the motion to suppress, Appellant Johnson testified that, on the day of the arrest, he had been playing basketball at Stanton Road and Alabama Avenue, S. E., together with some other boys (M/S Tr. 5); that they left there, "going down towards Southeast," and stopped at the edge of some woods (M/S Tr. 5); that they arrived at the edge of some woods between 3:30 and 4:30 p.m. (M/S Tr. 5); that, shortly thereafter, an officer approached, stopped him, brought him into the woods, and asked him what they were doing in the woods (M/S Tr. 5-5A); that he told the officer that he was waiting for a girl to talk to her (M/S Tr. 5-5A); that, at this time, Hardy approached and joined the group and then the officer asked Appellants and Hardy to produce identification (M/S Tr. 5-5A); that all of the boys produced identification and

the officer left (M/S Tr. 5-5A); that the boys then decided to head back up towards Stanton Road and went into the woods (M/S Tr. 5-5A); that the officer then came up behind them and said he would like to talk to them for a few minutes, so they came back to him (M/S Tr. 6); that they then saw another park policeman and the two officers took them down into the woods and asked them about the safe (M/S Tr. 6); that the boys said that they didn't know anything about the safe (M/S Tr. 6); that the officers then accused the boys of taking the safe out of an automobile but the boys denied having a car (M/S Tr. 6); that the officer then told the boys to "stand right there until the detectives come," stating that "we will find out about this" (M/S Tr. 6); that detectives arrived on the scene and asked the boys about the safe, and the boys again replied that they knew nothing about it (M/S Tr. 6); and that the boys were then placed under arrest (M/S Tr. 6).

The only other witness at the hearing was Officer Cooper. He testified that at approximately 7:45 p.m. on the day of the arrest, while it was still light, he went to the vicinity of Bruce Place and Stanton Road, S. E. (M/S Tr. 12-13); that three or four minutes later he came upon Appellants and Hardy who appeared to be attempting to cover something with a mattress and a blanket (M/S Tr. 13, 16); that Hardy ran into the woods and Appellants sat down on the mattress (M/S Tr. 13, 16); that, after unsuccessfully looking for a vehicle, he returned to Appellants, who were approximately 100 feet

from where he had first seen them (M/S Tr. 13-14);[8/] that he questioned Appellants and Hardy as to "why they were there and why they chased some kids out of there" (M/S Tr. 14); that Appellant Johnson told him that a friend of his had dropped him off there to meet a girl (M/S Tr. 14); that he then went back to his cruiser and at that time discovered the safe under the mattress (M/S Tr. 14); that it was a black Victor safe, approximately two feet wide, two feet long, and three feet high, and that it weighed approximately 500 pounds (M/S Tr. 14); that a metal plate had been partially torn from the safe and that it appeared someone had attempted to "bust" the concrete bottom of the safe (M/S Tr. 15); that he then looked for the "suspects" but they had disappeared in the woods (M/S Tr. 15); that he then informed his superior by radio and "asked for assistance to locate them" (M/S Tr. 15); that he drove from the area, met his sergeant up on Bruce Place, about three blocks away, drove back to the area, arriving approximately five minutes after his departure, and stopped a couple of hundred yards short of where he had seen the safe (M/S Tr. 15); that he and his superior began walking and, as they rounded the bend, he saw Hardy run back into the woods (M/S Tr. 15); that, following Hardy, he located Appellants sitting

---

8/ Officer Cooper then testified that Hardy "at that time again ran into the woods" (M/S Tr. 14), although he had failed to testify that Hardy had ever returned from his first entry into the woods. The same inconsistency appears in the officer's testimony at trial (Tr. 100-101).

at the edge of the woods "between where the safe was" (M/S Tr. 15); that he then "took them into custody" (M/S Tr. 15); that the arrest occurred at approximately 8:00 p.m. (M/S Tr. 18); and that he did not learn that a housebreaking report had been made until 8:15 p.m. (M/S Tr. 18).

In addition to the foregoing, Officer Cooper testified at trial, as we have noted in Section II supra, that as a result of his conversation with the children, he followed them to the end of Robinson Place (Tr. 99); that he never talked to the children again (Tr. 120); that when he first talked to Appellants, after having looked unsuccessfully for a car, he found them sitting on a log (Tr. 101); that he asked the Appellants and Hardy to show identification and that they complied willingly and cooperated in every way (Tr. 119); that the children had departed before he completed his conversation with the boys (Tr. 80-81, 120); that he found a screwdriver and a lug wrench on the ground beside the safe (Tr. 101-102); that the safe was unopened (Tr. 107); that after discovering the safe two or three minutes elapsed before he looked for the boys (Tr. 102, 120, 121); that he devoted approximately eight or ten minutes to reporting and enlisting assistance (Tr. 122); that when he followed Hardy to Appellants he asked the boys to come with him, which they did (Tr. 123); that he first took them to a point midway between his cruiser and the safe (Tr. 124), before leading them to the cruiser and radioing the dispatcher to inquire whether

any safe had been reported missing (Tr. 124); that he told Appellant Woodard not to go away (Tr. 127); and that, finally, between 8:15 and 8:30 p.m. he received a report that a housebreaking and missing safe had been reported (Tr. 128-129).

Since it is an arresting officer's knowledge at the moment of arrest that determines the existence vel non of probable cause, Rios v. United States, supra, some discussion and analysis of the testimony are required to determine precisely what the record shows Officer Cooper knew when Appellants were arrested and to segregate those facts which the record does not show were known to him. Thus, it is significant that the record is silent concerning a number of important matters, and there is no showing that certain other facts of record were known to Officer Cooper.

At the moment of arrest, Officer Cooper had no knowledge whatsoever of the alleged housebreaking at the complaining witness' apartment. This was conceded in the testimony of Officer Cooper at the hearing (M/S Tr. 18):

"BY MR. RAFFERTY:

* * *

Q When did you ascertain there was a housebreaking at the complaining witness' apartment?

A I would say approximately half an hour.

Q What time would this have been?

A Approximately 8:15.

Q You had placed them under arrest prior to this time?

A That is right."

As a consequence, through the time of Appellants' arrest, Officer Cooper had no basis whatsoever for linking the safe, the electric blanket, and the radio to the complaining witness.

Secondly, although the nature of the area of the arrest is critical to an evaluation of the officer's actions, there is almost no evidence on this point. There are many varieties of wooded areas within the District of Columbia, in some of which the appearance of a safe as described would not be in the least suspicious. But it is not clear from the record whether the area here in question is, for instance, a residential neighborhood,[9/] a park, or a junk heap, etc., on the one hand, or a wilderness area on the other. Thus, from the record made, it is impossible to determine whether the acts leading to Appellants' arrest occurred in a residential neighborhood where the scene described by the officer would have been equally consistent with movers finishing up a day's work or, also inconsistent with suspicion, simply a junk heap containing abandoned automobiles, sinks, stoves, mattresses, blankets, bath tubs, and even a battered safe. Accordingly, there is no reason to assume from the "wooded-area" description that there was anything stealthy about the scene observed by the officer.

Nor is it clear what Pamela and her companions told Officer Cooper. It is what the officer learned from talking

---

9/ There is testimony that would indicate the existence of houses somewhere on Robinson Place (Tr. 50).

Thus, the existence of probable cause depends solely upon what Officer Cooper observed personally, plus the information about the car and the stone-throwing gained from the children.

There has been no showing, either at the hearing on the motion or at trial, that Officer Cooper had any reason to believe that the safe did not belong to Appellants and Hardy, that they had not merely come upon it, or that there was not some other satisfactory explanation for its presence. Apparently, the officer jumped immediately to the conclusion that the object, just because it was a safe in a wooded area, was stolen. Without more, there is simply no basis for such a conclusion.

Not the slightest showing was made that Appellants and Hardy failed to account satisfactorily for their presence in the area. There is nothing unworthy of belief about the statement of Appellant Johnson that the boys were there to meet a girl. Indeed, the officer admitted at trial that the boys identified themselves and were willing and cooperative. There was no showing that the officer knew the boys or their backgrounds. He therefore could have had no reason to believe that they likely would be engaged in an unlawful act by reason of any past misconduct. Nor were the boys' actions such as to arouse suspicion, under the cirumstances. Their conduct is hardly consistent with what would be expected of a group fearful of being apprehended for housebreaking and grand larceny. Although fifteen minutes or more elapsed

between the arrival of the officer on the scene and their arrest, and although the officer departed the scene for from five to eight minutes and travelled more than three blocks away, they never moved, or attempted to move, more than 250 feet from where they were first observed. When they were finally placed in custody, Appellants were simply sitting on the ground by the edge of the woods.

Similarly, there is no government evidence that Officer Cooper, after discovering the safe, even tried to interrogate Appellants to determine their relationship to the safe and why it was there.[10/] In connection with his second and last meeting with Appellants before the arrest -- the only meeting after he discovered the safe -- Officer Cooper's testimony at the hearing and at trial is consistent. At the hearing, Officer Cooper testified (M/S Tr. 15):

> " * * * I observed Hardy running from the scene back into the woods and following him, that is when I located Woodard and Johnson sitting at the edge of the woods between where the safe was and I took them into custody."

At trial, the officer testified as follows (Tr. 123):

> "Q When you came back the second time, did you --what did you ask them?
>
> A Well, when I came back the second time, I did not see Johnson and Woodard but I observed Hardy running from the area of the safe and by following him, following him back into the woods, that is when I found Johnson and Woodard.

10/ Appellant Johnson, on the other hand, testified at the hearing that the officer did make such an inquiry and that the boys replied they didn't know (M/S Tr. 6).

crimes for which Appellants were arrested in the instant case were not committed in the officer's presence.

As we show below, the government failed to establish beyond a reasonable doubt that the allegedly stolen property was worth $100 or more. A fortiori, there was even less basis for Officer Cooper to assume that, even if a crime had in fact been committed, it involved property having the required value. The safe was the only article with which Officer Cooper was then concerned. And, although the officer described the safe, there is no showing that, even mentally, he ascribed any value whatsoever to it. Indeed, he referred to the cement base of the safe as broken, possibly indicating a belief that the safe was damaged and of insignificant value.[11/] Certainly, there was no showing of any kind as to Officer Cooper's estimate of the value of the safe itself.

As to the contents of the safe, Officer Cooper knew nothing. Only guesswork could have led him to believe that the safe contained $100 or more.[12/] As a consequence, he was

---

11/ It should be noted that the indictment alleges that the safe is worth only $50.

12/ The crime of housebreaking, of course, requires no proof of value. But it would have been the sheerest speculation for the officer to have concluded not only that the safe was stolen but that a housebreaking had occurred. Thus, even if it were to be assumed, arguendo, that probable cause existed for the officer's concluding that the safe was stolen, there is not a scintilla of evidence in the record to suggest that the officer had any basis in fact whatsoever for arriving at the conclusion that a breaking and entering, or an entering without breaking, was required in order to steal it.

-- at the most -- making an assumption as to value. Manifestly, an assumption such as this cannot be the probable cause required by law to justify an arrest without a warrant.[13/]

For all of the foregoing reasons -- the officer's lack of knowledge that a housebreaking had been committed or that a safe was missing; the absence of testimony about the nature of the arrest scene and what the children told the officer; the absence of any showing why the officer assumed the safe to be stolen; the absence of any showing that Appellants and Hardy failed to account satisfactorily for themselves; the absence of any showing that the officer even inquired as to the boys' explanation for the safe; and the absence of any basis for the officer to assume that the articles he saw were worth $100 or more -- it is clear that Officer Cooper had no probable cause to arrest Appellants. The authorities furnish ample support for that conclusion.[14/]

13/ It must be borne in mind that under the circumstances of the instant case the officer already had determined the identities of the three boys. As a consequence, if after the reflective process of obtaining a warrant had taken place an arrest still appeared justified, the boys could have been apprehended. No suggestion has ever been made that the boys did not identify themselves accurately.

14/ Rios v. United States, supra; Henry v. United States, supra; Kelley v. United States, 111 U.S.App.D.C. 396, 298 F.2d 310 (1961); Bynum v. United States, 104 U.S.App.D.C. 369, 262 F.2d 465 (1959); and United States v. Mitchell, 179 F.Supp. 636 (D.C. 1959).

The Mitchell case is close in point. There, at 5:30 a.m. on July 22, 1959, a uniformed police officer was walking his beat when he observed a man attempting to flag a taxicab. The man was carrying what appeared to be a sack, and from it an electrical cord was dragging on the ground. The officer stopped the man and asked him where he was coming from and what his name was. The man replied that he was coming from a party and stated his name. Upon request of the officer, the man took from his wallet a selective service card which corroborated his oral identification. The officer testified that, "walking my beat all night long, I did not observe any party anywhere." However, at this point, no crime had been reported to the officer, and he had observed none. No warrant for the arrest of the man was outstanding.

The officer then asked the man to accompany him to a police call box which was about one block away. When the man inquired whether he was under arrest, the officer replied: "No, you are just being detained." At the call box, the man seated himself on the record player contained in the sack (a pillow case), and the officer put in his call. He inquired whether there had been any reported housebreakings, and was told there had not been. He then requested the dispatch of a scout car to the area, when, by coincidence, a scout car appeared. At this point, the man fled from the scene, leaving the property behind. He was apprehended one week later and, having been indicted for housebreaking and

larceny of the record player and records, he moved to suppress the evidence.

The court there held that the man was arrested when he accompanied the officer to the call box and that there was no probable cause for the arrest. Indeed, the government there conceded that if the man was held to have been arrested when he was taken to the call box, there was no probable cause.

In view of the foregoing, it is manifest that Officer Cooper lacked probable cause to arrest Appellants. As a consequence, all of the evidence obtained thereby, including specifically the fingerprints of Appellant Woodard taken several hours later at police headquarters, is tainted and should have been suppressed by the District Court. Bynum v. United States, supra; and Gatlin v. United States, 117 U.S. App.D.C. 130, 326 F.2d 666, 672 (1963).

2. The Detention of Appellants For More Than Thirty-six Hours Was Illegal.

Even assuming, arguendo, that Appellants' arrest was lawful, it is clear that Appellants were not taken before a committing magistrate and advised of their rights without unreasonable delay as required by Rule 5(a) of the Federal Rules of Criminal Procedure. As a consequence, the fingerprint and all other evidence obtained from Appellants during their illegal detention should have been suppressed by the District Court.

The record reveals that the Appellants and Hardy were arrested at approximately 8:00 p.m. (M/S Tr. 18; Tr. 128). The boys were then questioned and searched at the scene of the arrest. For some reason, they were not taken to a police station until approximately 9:00 or 9:30 p.m., or later (M/S Tr. 19). During the course of the interrogation and search at the scene of the arrest, the officers examined a small radio carried by Appellant Johnson and determined that it contained the name of a person who later developed as the complaining witness (Tr. 111-114). Indeed, although the testimony is contradictory on this point, it may be that it was the radio that led the police to the complaining witness, for it appears that he reported the housebreaking only after having received a call from the police stating that they had a radio with his name on it (compare Tr. 111-114 with Tr. 33).

In any event, the Appellants were not taken to the police station until some time after 9:00 p.m. and were not fingerprinted until after midnight (Tr. 133, 137). Meanwhile, the police had conducted an extensive search of the complaining witness' apartment in an effort to uncover fingerprints. The complaining witness testified that an officer arrived at his apartment at approximately 8:30 p.m. and did not complete his examination until a few minutes after 11 o'clock (Tr. 41). Finally, after the government had devoted almost six hours to developing its fingerprint evidence, the Appellants were booked shortly after 2:00 a.m. on Sunday, June 6, 1965, (Tr. 180-181). Not until the following Monday, June 7, 1965, were the Appellants taken before a committing magistrate. Accordingly, the Appellants were detained for more than thirty-six hours before being taken before a committing magistrate. No reason for this delay has ever been given, and no showing was made that the police had attempted to take Appellants before a committing magistrate at an earlier time.

Under the circumstances of this case, the detention of more than four hours prior to fingerprinting, the six-hour detention prior to booking, and the thirty-six-hour detention prior to any contact with a committing magistrate, both separately and cumulatively, constituted an unreasonable delay such as is proscribed by Rule 5(a). Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356 (1957). Since evidence,

including the radio recovered from Appellant Johnson and the fingerprint taken from Appellant Woodard, were obtained during an illegal detention, it should have been suppressed, and the District Court erred in not doing so. As a consequence, Appellants were highly prejudiced, and the conviction based on that testimony cannot stand.[15/]

B. The Court's Instruction as to the Inference to Be Derived From the Possession of Stolen Goods Was Erroneous and Deprived Appellants of Their Rights Under the Fifth Amendment.

The trial court instructed the jury as follows (Tr. 233-234):

> "There still remains for your consideration another principle of law and this is known as possession of recently stolen goods. If you find that the government has proved beyond a reasonable doubt that any one or more of these defendants had in his possession property recently stolen from the complainant's apartment, then you may, under the instruction that I will give you, infer therefrom the guilt of such defendant or defendants as to the two counts here charged, but you are not required to so infer.
>
> "Now, with reference to the principle of law of possession of recently stolen goods, you are instructed that if you find that a defendant knowingly had in his possession in the District

---

15/ Greenwell v. United States, 119 U.S.App.D.C. 43, 336 F.2d 962 (1964), cert. denied 380 U.S. 923, 35 S.Ct. 921 (1965); Seals v. United States, 117 U.S.App.D.C. 80, 325 F.2d 1006 (1963), cert. denied 376 U.S. 964, 84 S.Ct. 1123 (1964); Gatlin v. United States, supra; Bynum v. United States, supra.

of Columbia, such possession being actual or constructive, any of the property recently taken from the complaining witness, Mr. Immel, and there has been a failure to explain such possession to your satisfaction, then you may infer therefrom the guilt of such defendant or defendants of the charge.

"If, however, you find there has been explanation which satisfies you, then you would not so infer.

"In this connection you are further instructed as a matter of law that possession means not merely physical possession but includes constructive possession as well.

"Constructive possession occurs when a person does not have within his hands or grasp the article in question but does have dominion and control over the article.

"As I have said to you, if you find that the government has proved possession, actual or constructive, as to any one or more of these defendants and there has not been satisfactory explanation thereof, then you may, if you deem it wise to do so, infer therefrom the guilt of the defendant or defendants as to count one, and as to count two or either.

"I think I have said to you that possession, whether it be actual or constructive, must be proven beyond a reasonable doubt."

As we show below, the foregoing instruction, particularly the references to an "unexplained" possession deprived Appellants of their privilege under the Constitution of the United States to remain silent at trial and have no inference drawn therefrom. The court also erred in failing to instruct the jury that the foregoing inference might be drawn only as the result of exclusive possession. Both are

plain errors requiring reversal. Rule 52(b), Federal Rules of Criminal Procedure.

1. The Inference-From-Possession Instruction Permitted the Jury to Draw an Inference of Guilt From Appellants' Failure to Testify.

No discussion or extensive citation of authority is required to establish the proposition that every defendant in a criminal case has the absolute right not to testify and that the jury may not draw any inference of guilt therefrom.[16/] But, as we show below, this is precisely what the inference-from-possession instruction, as worded by the trial court, did in the instant case--in effect the jury was permitted to draw an inference from the fact that Appellants did not testify and explain their proximity to and possession of certain of the allegedly stolen property.

The importance of prohibiting impingement upon the right to remain silent without any inference of guilt being attached to the exercise of that right was underscored in Helton v. United States, 221 F.2d 333 (5 Cir. 1955). There, the court stated (221 F.2d at 341-342):

> "Appellant also complains of the admission, over objection, of testimony by one of the city police to the effect that after his arrest, Appellant was given an opportunity to explain the

---

16/ Fifth Amendment to the Constitution of the United States; 18 U.S.C. § 3481; Bruno v. United States, 308 U.S. 287, 292 (1939); and White v. United States, 114 U.S.App.D.C. 238, 314 F.2d 243 (1963).

presence of marijuana found on his premises and that he did not do so. In the circumstances of this case, we hold that this testimony constituted an attempt on the part of the Government to convict the appellant by his silence, by having the jury draw an inference of guilt from his refusal to explain, in violation of the spirit, if not the letter, of the Fifth Amendment

* * *

" * * * Under our law it is not the function of police officers to determine for the benefit of the jury whether or not a person under arrest on suspicion of crime has given a sufficient explanation, or any explanation at all, and the fact that the accused here remained silent rather than risk unwitting distortion of his statement by a police officer at a later date does not give in law, and should not be allowed to give in fact, rise to an inference of guilt. * * *

"Congress, when it freed the accused in a criminal case from the common law disability against testifying in his own behalf, was careful to provide that 'His failure to make such request (to testify) shall not create any presumption against him.' 18 U.S.C. § 3481. Congress thereby recognized that implicit in the privilege against self-incrimination is not only the right to remain silent, but more important, the right not to have that very silence give rise to an inference of guilt." [Footnote and citations omitted.]

Assuming, arguendo, the propriety of the inference-from-possession instruction in most cases,[17/] it is highly prejudicial when given in a case in which the defendant does not testify and when it is coupled with language basing it upon the absence of an explanation for possession. The

---

17/ Bray v. United States, 113 U.S.App.D.C. 136, 306 F.2d 743 (1962), and cases there cited; and Trachtenberg v. United States, 53 App.D.C. 396, 293 F. 476 (1923).

problem is well illustrated in the instant case. As we have noted, neither Appellants nor Hardy testified at trial. Significantly, the record shows that their appointed counsel were very sensitively attuned to the possibility that, as a result of not testifying, the jury would draw an inference of guilt--however strong the court's admonition to the contrary might be. Thus, the appointed counsel for Appellants and Hardy, obviously seeking to de-emphasize the failure to testify, each requested the trial court not to give the standard instruction that no inference shall be drawn from a defendant's having exercised his constitutional privilege (Tr. 173-179).

The court, of course, honored this request. Nevertheless, when instructing on the jury's right to draw an inference of guilt if it found Appellants and Hardy in possession of stolen goods, the court three times based the jury's right to draw such an inference on the absence of an explanation for possession (Tr. 233-234):

> ". . . and there has been a failure to explain such possession to your satisfaction . . ."
>
> "If, however, you find there has been explanation which satisfies you, then you would not so infer."
>
> ". . . and there has not been satisfactory explanation thereof . . ."

Since there is no showing in the record that Appellants or Hardy, either at the time of their arrest or at any other time prior to the trial, made any explanation

for their alleged possession of certain of the allegedly stolen property, the net effect of the "unexplained" language in the inference-from-possession instruction given by the trial court was to focus a bright light on the fact that Appellants did not testify. If there had been evidence of any explanation offered at the time of the arrest, or anytime thereafter prior to trial, the "unexplained" language perhaps would not be so prejudicial. In that situation, it is at least arguable that the jury's attention would be focused on the quality of the explanation offered, as revealed by the evidence, and not on the total absence of an explanation as exhibited by Appellants' exercise of their right to stand mute.

Similarly, if the Appellant Woodard had chosen to testify, the instant problem would not have arisen. In that situation, whether or not he had chosen to explain his proximity to the stolen articles, this limited constitutional and statutory issue would have been waived.

Appellant Woodard respectfully submits that it was error for the court below to include the inference-from-unexplained possession instruction in the instant case since that instruction — under the circumstances here present where the Appellants elected to stand on their constitutional privilege not to testify and offered no "explanation" evidence — in practical effect permitted the jury to draw

an inference of guilt from the silence of the accused, contrary to the Fifth Amendment and 18 U.S.C. § 3481. Accordingly, the instruction as given by the court under the circumstances of this case was improper and highly prejudicial.

2. The Inference-From-Possession Rule Requires That Possession Be Exclusive and That Joint Possession Requires Concerted Action

The trial court also erred in not instructing the jury that the possession necessary to raise an inference of guilt must be exclusive and that if possession is shared with others concerted action is required.

Exclusive possession means actual control, dominion or authority. Mere suspicion of possession is not enough. Thus, proof that a defendant was seen sitting in the right hand front seat -- not the driver's seat -- while the car was standing still and proof that the print of one of his fingers was found on the wing window of the right front door were held insufficient to show control, dominion, or authority over the car in Allison v. United States, 10 Cir., 348 F.2d 152 (1965). In the present case, the government's evidence was similarly deficient to equate the observed presence of Appellants near and around the safe with "control, dominion and authority" over such property. In any event, the trial court should have made clear to the jury that in order to permit an inference of guilt from possession of recently stolen goods, a corpus delicti having been established, it

is necessary that the possession be exclusive.[18] It would appear, however, that the requirement that possession be "exclusive" does not mean that the possession be separate from all others. Thus, an exclusive possession may be the joint possession of two or more persons provided they are acting in concert.[19] When viewed against the fact of record, it is clear that the instruction as given was erroneous and prejudicial.

There is no evidence whatsoever that Appellant Woodard had sole possession of any stolen property. As we have noted, the Appellant Woodard was observed in the company of two other persons, the Appellant Johnson and Hardy, in the area of the safe. Moreover, the uncontradicted testimony is that all three boys were dropped off at the scene of the arrest by two other persons. So far as the record shows, the other two persons have never been identified, questioned, or taken into custody. Their relationship to the Appellants

---

18/ See e.g., Travers v. United States, 118 U.S.App.D.C. 276, 335 F.2d 698 (1964); United States v. Fay, 332 F.2d 1020 (2 Cir. 1964), cert. denied 379 U.S. 983, 85 S.Ct. 693 (1965); McKnight v. United States, 114 U.S.App.D.C. 40, 309 F.2d 660 (1962); Wright v. United States, 89 U.S.App.D.C. 70, 189 F.2d 699 (1951); Trachtenberg v. United States, supra; and Jackson v. United States, 146 A.2d 577 (D.C.Mun.App. 1958).

19/ Cf. McNamara v. Henkel, 226 U.S. 520, 33 S.Ct. 146 (1913); Travers v. United States, supra; United States v. Luciano, 343 F.2d 172 (4 Cir. 1965), cert. denied 381 U.S. 945, 85 S.Ct. 1792 (1965); Manning v. United States, 215 F.2d 945 (10 Cir. 1954); and Edwards v. United States, 78 U.S.App.D.C. 226, 139 F.2d 365 (1943), cert. denied 321 U.S. 769, 64 S.Ct. 523 (1944).

and the articles involved is a matter of conjecture. In order to infer guilt on the part of Appellant Woodard for such joint or shared connection with those articles, the jury should have been instructed on the necessity of concerted action. This was not done (Tr. 233-234).

Although the force of the Bray case[20/] is recognized, it is respectfully submitted that the foregoing errors, taken together with the other errors discussed herein, constitute plain error under Rule 52(b) of the Federal Rules of Criminal Procedure.

20/ 113 U.S.App.D.C. 136, 306 F.2d 743 (1962).

C. The Evidence of Value Was Insufficient Upon Which To Sustain a Conviction of Grand Larceny, and the Court Erroneously Submitted the Issue to the Jury.

Over the objection of Appellants (Tr. 167, 172), the trial court submitted the issue of grand larceny to the jury (Tr. 228-230). As we show below, however, there was insufficient evidence that the value of the property allegedly stolen was $100 or more.

Of the numerous items allegedly stolen, there is evidence of the value of only one. The complaining witness testified that the electric blanket had been purchased several weeks before for approximately $29. No value was estimated for the safe, the radio, the men's shirts, the walking shorts, the pearls, or the watch. Accordingly, for the purposes of determining the degree of any offense, those items must be excluded from consideration. Whether or not grand larceny was proved, therefore, must depend upon the contents of the safe.

The complaining witness testified that he kept personal papers, deeds, and some cash in the safe (Tr. 26). No value was estimated for the personal papers or the deeds. With respect to the cash, the complaining witness testified that about two weeks before the housebreaking he had placed $280 in the safe and that he later took $10 out (Tr. 26). At that point, the prosecuting attorney led the complaining witness to the following testimony (Tr. 26):

"BY MR. TITUS:

* * *

Q So on the morning of June 5, when you went to work, how much money would have been in the safe?

A In them bills was $270 and we had a couple of -- about 6 or 8 silver dollars some odd change and a bunch of old coins in a bag.

Q All right, sir. That was in the safe on that morning?

A That's right."

On cross-examination, it became apparent how flimsy was the basis of the complaining witness' conclusion as to the value of the contents of the safe. The following colloquy ensued (Tr. 39-40):

"BY MR. HICKEY:

Q Mr. Immel, had you had occasion to open your safe on the morning of the 5th of June, before you went to work?

A No.

Q When was the last time before 5th of June that you had opened the safe and looked into it?

A Oh, I can't answer that truthfully. Probably a week.

Q Do you recall when it was that you put in the $280 in cash into the safe?

A Well, about a week ahead of that, the last time I opened it. Probably two weeks, I imagine, but I can't be too positive of the date."

This testimony is clearly insufficient upon which to base a conviction for grand larceny. Since, as we have seen, the complaining witness testified that he had not been in the safe for at least a week, he could have had no personal knowledge of the contents of the safe on the day of the

housebreaking. No showing was made that the complaining witness was the only person having access, legally or illegally, to that safe.

Although the complaining witness lived with his wife in the apartment containing the safe, there is no testimony as to whether his wife had access to the safe during the days immediately preceding the housebreaking and, if so, whether she had withdrawn anything therefrom. The complaining witness' wife was available under a subpoena by the government, but she did not testify. The record does not reveal whether any additional persons may validly have had access to the safe.

Nor was any showing made that the complaining witness would have known if the safe had been entered illegally during the days immediately preceding the housebreaking. Although it appears that the safe was locked on June 5th, there was no testimony concerning whether the safe ordinarily was kept in a locked condition. If the safe had been unlocked for even a brief period preceding the crime, it cannot be assumed that the cash believed by the complaining witness to be in the safe at the time of the alleged housebreaking was in fact still there. In short, there has been no showing that someone other than the complaining witness did not remove the cash from the safe.

Since the safe was recovered by the police in a locked condition (Tr. 48, 107), it would appear that the

value of the goods stolen could have been established precisely by determining the contents of the safe at the time of recovery. Whether or not this was done, the record fails to make clear. The complaining witness, the only witness to testify on this point, stated simply that two days after the housebreaking he went to the basement of the Municipal Building, where the safe was being held, and "took the contents out right then and there and took them home" (Tr. 48). There was no suggestion that any cash found in the safe was counted. Nor was there any other government testimony concerning the contents of the safe upon recovery.[21/]

In the face of this record, it is simply impossible to say that the government has proved beyond a reasonable doubt that the goods allegedly stolen from the complaining witness' apartment were worth $100 or more. Since value is one of the elements of grand larceny and must be proved beyond a reasonable doubt, it was error for the trial court to submit the grand larceny issue to the jury, and the conviction resulting therefrom cannot be sustained.

In these circumstances, so much of the sentence for grand larceny as exceeds one year must be set aside.

21/ Since it would have been so easy for the government to have proved the required value, if it in fact existed, it must be assumed that it could not be proved. If there had been $270 (or any amount in excess of $71) in the safe, it would have been a simple matter for a government witness to have so testified. Indeed, had that been the case, it would appear that the government could have employed its own custodian, or any other observer of the removal of the contents of the safe, as a witness.

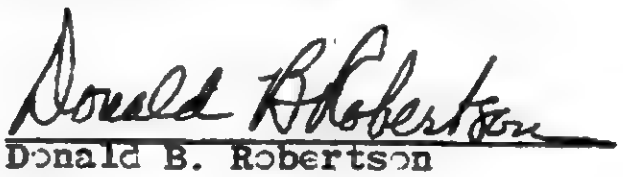
VII

CONCLUSION

WHEREFORE, for all of the foregoing reasons, the judgment of the District Court must be reversed and the case remanded with directions to enter a judgment of acquittal or, in the alternative, for a new trial.

Respectfully submitted,

Richard S. T. Marsh



Donald B. Robertson

Ross, Marsh & Foster
725 - 15th Street, N. W.
Washington, D. C. 20005

Attorneys for
Appellant Woodard
Appointed by this Court

March 24, 1967

REPLY BRIEF FOR APPELLANT WOODARD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,102

JOHN E. WOODARD, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United
States District Court for
the District of Columbia

Richard S. T. Marsh
Donald B. Robertson

Ross, Marsh & Foster
725 - 15th Street, N. W.
Washington, D. C. 20005

Counsel for Appellant
Appointed by This Court

May 16, 1967

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of March, 1967, the foregoing "Brief for Appellant" was served upon Frank Q. Nebeker, Assistant United States Attorney, Chief of the Appellate Section, Office of the United States Attorney, United States Court House, Washington, D. C., by delivering a copy thereof to him at the above address, and upon John E. Woodard, Jr., 538 - 14th Street, S. E., Washington, D. C., and Richard H. Nicolaides, Esquire, Investment Building, Washington, D. C. 20005, Attorney for Appellant in No. 20,109, by mailing copies thereof to them at the foregoing addresses.

Donald B. Robertson

Donald B. Robertson

I N D E X

TABLE OF CONTENTS

TABLE OF CASES

Cases:

* Cases and Authorities chiefly relied upon.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 20,102

JOHN E. WOODARD, JR.,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal from the United States District Court
for the District of Columbia

REPLY BRIEF FOR APPELLANT WOODARD

The Government Brief is at odds with the record governing this appeal with the result that it fails to come to grips with substantial contentions advanced by Appellant Woodard's Initial Brief. As we show below, the departures from the record pervade much of the Government's Brief, but this weakness is most prevalent with respect to the issue of probable cause.

trial. It becomes critical, therefore, to determine exactly what Officer Cooper, prior to the arrest, heard from the children. On this question, the Government brief contains the following statements, none of which is supported by the record:[3/]

> ". . .The children . . . told the officer what had happened. . . ."
>
> "Several children . . . told him that they had just watched five men unload something from the trunk of their automobile in a wooded area. They further related that three men remained behind to guard the object. . . ."
>
> "Acting upon information that several men had just brought a large object to the woods in an automobile . . ."

As we have pointed out, however, neither Pamela nor Officer Cooper testified with respect to the substance of the conversation between the officer and the children.[4/] Nor is there any other direct evidence of the substance of that conversation. The only information that the record shows Officer Cooper obtained from the children is that a car had

---

3/ "Brief for Appellee" (hereinafter "Gov't Br."), pp. 3, 6 and 8. Significantly, these statements appear without the benefit of citations to the record.

4/ Initial Br., pp. 23-30. See also id. at 6, 26.

been in the vicinity (M/S Tr. 13) and that some boys had attempted to chase the children away from the wooded area (M/S Tr. 14, 17). As a consequence, with these exceptions only, the record is barren with respect to Officer Cooper's knowledge of what the children claimed to have seen. There is not a scintilla of evidence to suggest that he was told by the children that any object had been removed from the car they claimed to have seen. Indeed, contrary to the implication carried by the juxtaposition in the Government's brief of one of the foregoing statements immediately preceded by the statement that "Pamela identified . . . the defendants,"[5/] the record even fails to show that Pamela or any of the other children ever pointed out Appellants and Hardy to Officer Cooper as the boys who had chased them away.[6/]

Since the Government argument on probable cause is pitched principally upon the foregoing erroneous statements of fact, that argument should be disregarded. Probable

---

5/ Gov't Br., p. 3

6/ See, e.g., M/S Tr. 12-13, 16-17 and Tr. 58-59, 98-99, 120. Moreover, even had the children related their tale to Officer Cooper, there is no showing that he had any basis for believing the children to be reliable informants. (See e.g., Tr. 89). In the absence of such a showing, information obtained from them could not be considered in determining whether probable cause existed. See, e.g., Wong Sun v. United States, 371 U.S. 471, 479-482, 83 S.Ct. 407, 413 -414, (1963); and United States v. Jones, 340 F.2d 913 (7th Cir. 1961).

cause in the instant case must be determined solely on the basis of the officer's knowledge at the moment of the arrest as shown by the record — and nothing else. Rios v. United States, supra.

Similarly, the Government Brief is replete with statements to the effect that someone "had just sought" to open the safe or had "recently" tampered with it, suggesting that Officer Cooper's arrest was based on such "fact."[7/] Again, however, the record is bare. There is nothing in the record indicating when any tampering with the safe might have occurred, much less that Officer Cooper was aware of it. There is evidence of the size of the safe, its color, its position, and that its bottom may have been chiseled.[8/] But there is nothing in the record to suggest that Officer Cooper had any factual basis for concluding when this chiseling might have occurred or how long the safe might have been in the wooded area. Indeed, there is nothing in the record to show the condition of the safe. For instance, there is no evidence from which it can be determined whether Officer Cooper even observed the safe to be bright and shiny, on the one hand, or dull, rusty and weather-beaten on the other. No more information appears with respect to the lug wrench

---

7/ These statements, also, are singularly devoid of record citation. See "Questions Presented" and pp. 5, 6 and 8.

8/ See e.g., M/S Tr. 14-15 and Tr. 101-107.

and screwdriver.[9] In short, from the bare description of the safe in the record — and the safe was not introduced into evidence — there is no basis whatsoever for determining whether it had "recently" been tampered with or whether someone "had just sought" to break it open.[10]

Again, Government counsel suggest — without benefit of citation to the record — that Appellants offered Officer Cooper "no plausible explanation for their conduct."[11] Officer Cooper, however, made no such claim — either at trial or at the hearing on the motion to suppress. Indeed, the record appears to contradict this assertion. Thus, Appellant Johnson explained that he was waiting for a girl to talk to her (M/S Tr. 5-A, 14), and Officer Cooper testified that he asked the boys for

---

9 / While Government counsel attempt to add the hint of suspicion by constantly implying that Officer Cooper observed an "electric" blanket around the safe, there is nothing to support the conclusion that at the moment of arrest Officer Cooper believed the blanket was electric. On the contrary, on innumerable occasions, even as late as the trial, Officer Cooper referred to the blanket only as "an old woolen blanket." See, c.g., M/S Tr. 13, 16, and Tr. 99-103.

10/ In a similar vein, Government counsel state that "the record belies the suggestion that the area might have been a junk yard or garbage dump." Gov't Br., p. 6, footnote 6. But their brief fails to refer the Court to any portion of the record which provides the requisite definition to the "wooded area." See Initial Br., p. 28. Clearly, unless we know where the officer was, we cannot evaluate his actions.

11/ Gov't Br., "Questions Presented" and p. 7.

identification and that they provided it willingly and co-operated in every way (Tr. 119). Manifestly, the record simply does not permit any suggestion that Appellants failed to give a "plausible" explanation.

In summary, the case argued by Government counsel is strikingly and significantly different from that reflected in the record in the instant case. Ignoring Rios, the Government has simply refused to focus upon the critical gaps in Officer Cooper's knowledge at the moment of arrest.[14] The nature of these gaps is suggested in some detail in our Initial Brief,[15] and there is no need to discuss them at this juncture. It will suffice to emphasize the combination of features extant in this case at the moment of arrest which distinguish it from the cases cited in the Government brief — the arresting officer had received no report of a house-breaking or that a safe was missing; the situs of the arrest has not been described; the arresting officer had never seen Appellants or Hardy and knew nothing derogatory about them; the record does not show that the arresting officer

---

[14] The Government also attempts to cloud the time at which Appellants were arrested. There can be no doubt, however, that they were arrested not later than the moment when Officer Cooper followed Hardy into the woods and found Appellants sitting on the ground approximately 250 feet from the safe. According to Officer Cooper's own testimony, at that moment he "took them into custody" (M/S Tr. 15).

[15] Initial Br., pp. 27-34.

had any reason to believe that Appellants and Hardy were the same persons involved in the stone-throwing tale related by the children; and the arresting officer's testimony shows that Appellants and Hardy willingly identified themselves and cooperated in every way.

When the record — as distinguished from the Government statement of the record — is examined with care, it is clear that Officer Cooper had no probable cause to believe that a felony had been committed by Appellants. Accordingly, all evidence of Appellant Woodard's fingerprint[12] and of the transistor radio found on Appellant Johnson should have been suppressed,[13] and the trial court

---

12/ The Government brief suggests that only the transistor radio is involved in the probable cause issue. Gov't Br., p 9. But it is clear that a fingerprint obtained following an illegal arrest must be suppressed. Bynum v. United States, 104 U.S.App.D.C. 368, 262 F.2d 465 (1959).

13/ Appellant Woodard does not challenge the admission of evidence with respect to the safe and the electric blanket since he has consistently denied ownership, dominion, custody, possession or control of these objects. As a consequence, these objects were not "abandoned," as suggested by the Government.

erred in failing to do so.[14/]

14/ The same result is compelled as a result of the illegal delay following Appellants' arrest and prior to their presentment. Fed. R. Crim. P., Rule 5(a). The cases cited by the Government fail to support its argument that a fingerprint obtained during a period of illegal delay is admissible. In fact, although a fingerprint ordinarily does not result from any testimonial statement by the defendant [cf. Mitchell v. United States, 114 U.S.App.D.C. 252, 257, 313 F.2d 884, 889 (1962)], the Government cases indicate that the taking of a fingerprint is permissible only during a period of lawful custody. Thus, in Smith & Bowden v. United States, 117 U.S.App.D.C. 1, 324 F.2d 279 (1963), the palmprint admitted was one taken a day before trial, not the one taken during a period of illegal delay in presentment. The illegal delay-fingerprint apparently was neither offered nor relied upon by the Government. The court stated (117 U.S.App. D.C. at 4, 324 F.2d at 282):

> "And it is elementary that a person in lawful custody may be required to submit to . . . fingerprinting . . . as part of routine identification processes." (emphasis supplied; citations omitted)

Moreover, in Payne v. United States, 111 U.S.App.D.C. 94, 294 F.2d 722 (1961), cert. denied, 368 U.S. 933 (1961), this court stated (111 U.S.App.D.C. at 98, 294 F.2d at 727):

> "Confrontation is thus a precaution against the making of baseless and unfounded charges. It holds few of the dangers which led to the promulgation of Rule 5(a), or the dangers attendant upon enforced fingerprinting during illegal detention." (emphasis supplied).

In the instant case, approximately six hours passed after Appellants' arrest before they were fingerprinted. During this period, the police were busily engaged in attempting to assemble latent fingerprints and other physical evidence to be used against the Appellants. When Appellants were finally fingerprinted — at approximately 7:00 a.m. on Sunday morning — it was not a "routine identification process" (see Smith & Bowden v. United States, supra) but an effort to obtain incriminating evidence from them, after which presentment could serve little purpose.

III

A Grand Larceny Conviction Cannot be Sustained on the Basis of This Record.

The Government brief is no more accurate in its treatment of the record with respect to the value of the goods stolen than with respect to probable cause. Not only has the Government failed to discuss — or even to give recognition to — the evidentiary shortcomings demonstrated in Appellant's Initial Brief,[15/] it has also mistakenly reported the meager testimony on the point that is contained in the record.

We have pointed out that the Government failed to adduce sufficient evidence to permit a finding that the money placed in the safe by the complaining witness two weeks before remained there on the day of the alleged crime. In an effort to shore up this hole in its case, the Government attempts to show that the money the complaining witness claims to have placedin the safe two weeks before must have been stolen since, so the Government asserts, it was in the safe when the latter was recovered. Thus, after stating its contention that "$270 in bills, six or eight silver dollars, and a bunch of old coins" were in the safe on the

---

15/ See Initial Br., pp. 48-51.

day of the housebreaking, the Government brief goes on to state:[16/]

> ". . . These contents were later given back to him at the police station (Tr. 48)." (emphasis supplied)

But the only testimony appearing at Transcript page 43 — or anywhere else in the record — which relates to the point is the following response of the complaining witness to an inquiry whether the safe was ever returned to him:

> "A. Yes. The Moses Safe Company picked it up and took it to their place for repairs and probably two weeks before I got it back but I took the contents out right then and there and took them home." (emphasis supplied)

Never did the complaining witness say what contents were removed from the safe when it was recovered. Indeed, the Government never inquired of the complaining witness or otherwise attempted to identify such "contents" on the record. That failure of proof cannot be cured by the Government's suggestion that, had there been missing any of the money the complaining witness believed to be in the safe, "he undoubtedly would have mentioned it."[17/] Clearly a conviction for grand larceny cannot be sustained

---

16/ Gov't Br., p. 2

17/ Gov't Br., p. 9

on the basis of the record as made below.[13/]

IV

Under the Circumstances of This Case, the Inference-From-Unexplained-Possession Instruction Violated the Fifth Amendment and Was Incomplete in Any Event.

The Government has failed to meet the issues raised by Appellant Woodard with respect to the inference-from-unexplained-possession instruction — i.e., that the "unexplained" phraseology prejudicially focused the jury's attention upon Appellant's exercise of his constitutional right to remain silent and that the trial court failed to give the jury sufficient guidelines with respect to the possession of stolen property when more than one person is involved.

13/ The distinction between grand and petit larceny affects the sentence, and the claim that the evidence of grand larceny is insufficient is not moot. Even if the Government were correct, the propriety of the sentence for grand larceny would be moot only if the housebreaking conviction were sustained, and the claim of mootness is, at the least, premature. Moreover, this court possesses "a considerable measure of discretion in the matter," and in an appropriate case in the interest of substantial justice it may remand for resentencing when, although the conviction affirmed is sufficient legally to support the sentence, uncertainty exists that the trial judge would have imposed the same sentence had he known that the conviction on another charge, to which the sentence also applies, would be reversed. Baber v. United States, 116 U.S.App.D.C. 353, 362, 324 F.2d 389, 394 (1963), cert. denied, 376 U.S. 972, 84 S.Ct. 1139 (1964). Here there is uncertainty that the trial court would have imposed the same sentence if Appellants had been convicted of petit larceny and housebreaking rather than grand larceny and housebreaking, and, even, if the housebreaking conviction were to be sustained, the case should be remanded for resentencing.

A. Under the Facts of This Case, the Inference-From-Unexplained-Possession Instruction Was Inconsistent with Appellant's Constitutional Right to Remain Silent.

The Government simply has ignored Appellant's claim that his rights under the Fifth Amendment were violated. Its brief states only that "the fact that Appellants did not testify provides no basis to distinguish this case from prior decisions that have approved the inference-from-possession instruction."[19/] But no case or other authority has been cited in support of this position. Nor have we been able to find any case expressly discussing and approving the instruction over a claim that a defendant's right to remain silent at trial, without adverse inference, has been violated.

With deference to the long line of cases approving the proposition that the possession of recently stolen goods by a defendant gives rise to an inference of his guilt,[20/]

19/ Gov't Br. p. 13.

20/ It should be noted, however, that not all cases approving the proposition as a general rule are support for instructing the jury to that effect. Thus, there are a number of cases in which the use and approval of the inference is limited to its employment by an appellate court for purposes of determining whether there is evidence sufficient to sustain a conviction. See, e.g., McAbee v. United States, 111 U.S.App.D.C. 74, 294 F.2d 703 (1961), cert. denied, 363 U.S.861 (1962); Gilbert v. United States, 94 U.S.App.D.C. 321, 215 F.2d 334 (1954); and United States v. Jones, 340 F.2d 913 (7th Cir. 1964).

we submit that the instruction to that effect, under the circumstances prevailing here, was a clear violation of Appellant's rights under the Fifth Amendment and under 13 U.S.C. § 3481. It is established beyond cavil, of course, that no adverse inference may be drawn from a defendant's failure to testify at trial.[21/] In these circumstances, it is manifestly contradictory to say that, while no inference may be drawn from a defendant's failure to testify, nevertheless if he fails to take the stand to explain an alleged[22/] possession of stolen goods, an inference of guilt may be drawn. Indeed, if the instruction is to be given at all under these circumstances, we submit that there would be far less chance of an adverse inference being drawn from a defendant's failure to testify — and, therefore, that it would be infinitely more fair — if all reference to the absence of an explanation were omitted.[23/]

21/ 18 U.S.C. § 3481 (1958), as amended; Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198 (1939); and White v. United States, 114 U.S.App.D.C. 238, 314 F.2d 243 (1963).

22/ The instruction is particularly grievous in the instant case because the evidence of possession here is far from compelling, and the trial court failed to give adequate instructions on the subject. See infra.

23/ Since, in the instant case, no evidence of an explanation was before the jury, the Appellant had nothing to gain from inclusion of the "explanation" language in the instruction.

Under the circumstances of this case, therefore, the inference-from-unexplained-possession instruction permitted the jury to focus upon and draw an adverse inference from the Appellant's failure to testify, and that instruction contravened his rights under the Fifth Amendment.

B. The Trial Court Failed to Set Forth Sufficient Guidelines for the Jury.

The Government asserts that the inference-from-unexplained-possession instruction by the trial court was "tailored to the facts of the case."[24/] In so asserting, the Government ignores, as did the trial court, the inescapable fact that if the Government testimony is to be believed then as many as five persons were associated with the stolen property at relevant times. The trial court failed to take cognizance of the joint nature of the alleged possession and, therefore, failed to provide the jury with criteria by which it might properly have determined whether or not the Appellant Woodard — who had no stolen property on his person — had the requisite constructive possession to give rise to an inference of guilt.

More than mere presence, with others, in the vicinity of stolen or illicit goods is required to establish

---

24/ Gov't Br., p. 5.

possession thereof.[25] Indeed, the Supreme Court of the United States recently has held unconstitutional a statute providing that one's unexplained presence at an illicit activity shall be deemed sufficient evidence to authorize his conviction for the custody, possession and control of the related facilities. United States v. Romano, supra. Thus, when stolen property is found in the presence of more than one person, the jury must be instructed on the criteria of possession as applied to the factual context of the particular case. Barfield v. United States, supra.[26]

The trial court in the instant case wholly failed to consider that there were at least three and at times five persons allegedly associated with the stolen goods. As a consequence, although the court did instruct . . .

25/ See, e.g., United States v. Romano, 382 U.S. 136, 86 S.Ct. 279 (1965); Gilbert v. United States, 94 U.S.App. D.C. 321, 215 F.2d 334 (1954); Allison v. United States, 348 F.2d 152 (10th Cir. 1965); United States v. Luciano, 343 F.2d 172 (4th Cir. 1965), cert. denied, 381 U.S. 945, 85 S.Ct. 1792 (1965); United States v. Spatuzza, 331 F.2d 214 (7th Cir. 1964), cert. denied, 379 U.S. 829, 85 S.Ct. 58 (1964); Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962), cert. denied, 371 U.S. 930, 83 S.Ct. 294 (1962); United States v. Landry, 257 F.2d 425 (7th Cir. 1958); and Barfield v. United States, 229 F.2d 936 (5th Cir. 1956).

26/ Cf. Rivera v. United States, 124 U.S.App.D.C. 99, 101, 351 F.2d 553, 555-556 (1966), cert. denied, 385 U.S. 939, 87 S.Ct. 303 (1966) (Bazelon, J., dissenting opinion); Miller v. United States, 121 U.S.App.D.C. 18, 17-19, 347 F.2d 797, 801-803, especially footnote 4 (1965) (Wright, J., dissenting opinion); and cases there cited.

that the possession required could be either actual or constructive and that possession must be proved beyond a reasonable doubt, it failed to provide the jury with criteria by which those principles could be applied to the facts of this case. Thus, at a minimum, the jury should have been instructed on the concept of joint possession and that, for an individual to have constructive possession of stolen property in the dominion, custody and control of a group, he must be found to have been acting in concert with the group.[27/] But the trial court, in the instant case, gave no such instructions.[28/] As a consequence, the jury had no proper basis upon which to find Appellant Woodard in possession of any of the stolen articles.

Under these circumstances, even if the inference-from-unexplained-possession instruction may ever be given when the defendant does not testify and when there is no evidence whatsoever of an explanation, that instruction was patently erroneous in the instant case when not coupled

---

27/ See, e.g., Luciano v. United States, supra, 343 F.2d at 172-173; Arellanes v. United States, supra, 302 F.2d at 606-607, 608; and other cases cited in footnotes 25 and 26, supra.

28/ The court did instruct on aiding and abetting (Tr. 227-228, 230, 232), but such instructions were removed from and not related to the discussion of possession (Tr. 233-234), and, therefore, provided the jury no guidance in considering the question of joint or shared possession.

with instructions setting forth the criteria for determining possession when more than one person is alleged to have been present in the vicinity of the stolen property. We submit, therefore, that the trial court committed plain error in giving the infcrence-from-unexplained-possession instruction in the instant case.

V

Conclusion

For all of the foregoing reasons, together with those set forth in Appellant Woodard's Initial Brief, the judgment of the District Court must be reversed as requested.

Respectfully submitted,

Richard S. T. Marsh
Richard S. T. Marsh

Donald B. Robertson
Donald B. Robertson

Ross, Marsh & Foster
725 - 15th Street, N. W.
Washington, D. C. 20005

Attorneys for Appellant Woodard
Appointed by this Court

May 16, 1967

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of May, 1967, the foregoing "Reply Brief for Appellant Woodard" was served upon Frank Q. Nebeker, Assistant United States Attorney, Chief of the Appellate Section, Office of the United States Attorney, United States Court House, Washington, D. C., by delivering a copy thereof to him at the above address, and upon John E. Woodard, Jr., 538 - 14th Street, S. E., Washington, D. C., and Richard H. Nicolaides, Esquire, Investment Building, Washington, D. C. 20005, Attorney for Appellant in No. 20, 109, by mailing copies thereof to them at the foregoing addresses.

Donald B. Robertson

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,108

JOHN E. WOODARD, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,109

MELVIN A. JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS,
[illegible] A. FREEMAN, JR.,
Assistant United States Attorneys.

Cr. No. 747-65

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) Did the trial court properly rule that the police had probable cause to assume custody over the stolen safe and electric blanket, to arrest appellants, and to seize the stolen transistor radio incident to that arrest? More specifically, did probable cause for these actions exist when the police officer:

(a) observed appellants trying to conceal the safe with the electrict blanket in a wooded area,

(b) noticed that someone had recently tampered with the safe,

(c) spotted a screwdriver and wrench beside the safe, and

(d) received no plausible explanation for their presence from appellants, who had meanwhile abandoned the safe.

(2) Were the fingerprints taken at police headquarters following arrest admissible into evidence?

(3) Was there sufficient evidence to support the convictions for grand larceny?

(4) Did the trial judge commit plain error by instructing the jury in accordance with the applicable law as to the permissible inference of guilt from possession of recently stolen property?

(5) Was there sufficient evidence for the jury to conclude that appellants had possession of the stolen property?

INDEX

TABLE OF CASES

Cases—Continued

Cases—Continued

OTHER REFERENCES

*Cases chiefly relied upon are marked by asterisks.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,108

JOHN E. WOODARD, JR., APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,109

MELVIN A. JOHNSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

The grand jury indicted appellants Woodard and Johnson, together with their co-defendant Hardy, in two counts

for housebreaking (22 D.C. Code § 1801) and grand larceny (22 D.C. Code § 2201). Judge McGuire denied a preliminary motion to suppress evidence, and the case was then tried before Judge Keech.[1] The jury found all three defendants guilty as charged on both counts. Woodard and Hardy received concurrent one-to-five year sentences on each conviction, while Johnson received concurrent two-to-six sentences. This appeal by Woodard and Johnson ensued.

The theft

On the evening of June 5, 1965, the complainant and his wife returned to their apartment to find that it had been forcibly entered and ransacked.[2] The following were included among the missing items: a safe with money, personal papers and deeds inside, an electric blanket, and a transistor radio. As the complainant was surveying the damage, the police telephoned to inform him that a transistor radio with his name and address had been recovered. The complainant in turn reported the full extent of his loss (Tr. 33, 46).

The complainant testified that when he left for work on the morning of June 5th, his safe contained, *inter alia*, $270 in bills, six or eight silver dollars, and a bunch of old coins in a bag (Tr. 26).[3] These contents were later returned to him at the police station (Tr. 48). He further related that he had purchased the electric blanket for $29 a few weeks earlier (Tr. 31-32).

---

[1] Prior to trial, Johnson's court-appointed counsel asked to withdraw because he had been unable to contact his client. At the hearing upon that motion, Judge McGuire revoked Johnson's bond. In this manner, he enabled counsel to confer with Johnson, and eliminated the basis for the motion to withdraw.

[2] The complainant explained that he worked in the Government Printing Office during the week, and at Bergman's Laundry on the weekends and holidays (Tr. 22). He regularly arises at "five o'clock in the morning to go to work." (Tr. 42).

[3] He testified that he had placed $280 in the safe about two weeks before the crime, and had removed only a $10 bill in the interim (Tr. 26).

What the children saw

On the same day, Pamela Collins and several friends were walking down an unpaved street in a wooded area a few blocks from her home when an automobile passed them and stopped at the end of the road (Tr. 53). She saw five men get out of the automobile, unload a large object from the truck, lean it against a tree, and throw a mattress over it (Tr. 54-55, 74). Two of the men then drove the car away. The other three men—who Pamela identified as the defendants—remained behind and sat down on a log (Tr. 55). The children tried to go nearer, but one of the men threw rocks at them. Whereupon they fled, stopped a police cruiser, told the officer what had happened, and led him back to where the defendants had been sitting.

Officer Cooper's investigation

While on his routine patrol of park property, Officer Cooper saw "four or five kids running across a field near a graveyard." Conversation with the children prompted him to go with them to where their adventure had occurred. On his arrival, Officer Cooper saw Woodard and Johnson "attempting to cover something with an old bed mattress and a woolen blanket." (Tr. 99-100). As he approached closer, Hardy ran into the woods, and Woodard and Johnson sat down on the partially covered object. He continued past this rather unusual tableau to look for the vehicle described by the children. Upon verifying that it had departed, Officer Cooper backed up his cruiser to Woodard and Johnson, who were approximately 100 feet from the object upon which he had first observed them (Tr. 101). Officer Cooper talked to the men for a moment, then walked over to where they had previously been sitting. Without having to lift up the mattress, he identified the object as a safe, which "wasn't completely covered" by the mattress and an electric blanket. On the ground beside the safe, he noticed a screwdriver and a lug wrench (Tr. 102, 106). Officer Cooper described the safe as being

two feet wide, two feet long, three feet tall, and weighing about 500 pounds (MS Tr. 14).[4] A metal plate had been partially torn from the safe, and the concrete bottom under the metal plate appeared to have been chiseled. The safe was still intact (Tr. 104).

As soon as Officer Cooper ascertained this, he turned around to find that Woodard and Johnson had disappeared into the woods. He returned to the cruiser, radioed his superior, explained what had happened, and requested assistance in searching for the suspects (Tr. 121). A short time later, Officer Cooper saw Hardy run into the woods, followed him, and found Woodard and Johnson sitting on the ground (Tr. 122-123). He asked them to accompany him to the area of the safe, which was about 250 feet away. There he radioed the dispatcher to check whether the safe had been reported stolen. During that time Officer Cooper told Woodard not to go away (Tr. 127). Within a few minutes two police detectives arrived. Through the police department it was soon learned that a safe similar to the one in the woods had been reported stolen in a housebreaking (Tr. 128-129). Law enforcement officers then drove the three suspects to police headquarters,[5] where they were fingerprinted and booked later that evening. On Monday morning, June 7, 1965, Woodard and Johnson appeared before a magistrate, waived a preliminary hearing, and were bound over for the grand jury.

The fingerprint evidence

The evening that the crime occurred, a technician dusted the complainant's apartment for fingerprints. On a metal file box he found a thumb print that matched the one obtained from Woodard upon his arrest (Tr. 144). This

[4] References to the transcript of the trial proceedings are designated by "Tr.", and the hearing on the motion to suppress by "MS Tr.".

[5] On the way to headquarters, Johnson threw the complainant's transistor radio out of the window of the police cruiser (Tr. 112).

evidence was presented at trial, accompanied by the expert's detailed description of the method used to compare the thumb prints (Tr. 146-156).

SUMMARY OF ARGUMENT

The circumstances in this case gave ample probable cause for the police officer to take custody of the safe and blanket. The safe had been left in plain view, partly covered by the electrict blanket. The officer could reasonably conclude that it was stolen property from its incongruous location and the indications that someone had just sought to break it open. Having examined the safe, the officer possessed probable cause to arrest appellants. For a few moments earlier he had seen them attempt to cover the safe with the blanket and then sit down on it. And when he stopped at the safe, appellants disappeared into the woods.

Once apprehended, appellants were taken to the police station, where they were booked and fingerprinted. The fact that the police went through these routine procedures before presentment did not render inadmissible the evidence that investigators had found the fingerprints of one appellant at the scene of the crime.

The complainant's uncontradicted testimony as to the amount of money contained in his safe at the time of the theft adequately supports the jury's verdict of grand larceny.

The trial court instructed the jury that they might infer guilt from the unexplained possession of recently stolen goods. This instruction, tailored to the facts of the case, accurately reflects the applicable law, and its wording accords with prescriptions of this Court. In addition, the judge correctly defined the requisite possession to include actual or constructive possession, and there was sufficient evidence for the jury to find that appellants had such possession.

ARGUMENT

I. The trial court properly admitted testimony and evidence concerning the stolen property recovered in the vicinity of appellants' arrest, as well as the transistor radio seized incident to their arrest.

a. *The police officer lawfully took the safe and blanket into custody.*

The circumstances disclosed to Officer Cooper not only justified but required his seizure of the safe and electric blanket as the obvious fruits of a crime. *Hiet* v. *United States*, —— U.S. App. D.C. ——, 372 F.2d 911 (1967).

Several children stopped his cruiser and told him that they had just watched five men unload something from the trunk of their automobile in a wooded area.[6] They further related that three men remained behind to guard the object. The officer followed the children back to this place, where he saw appellants attempting to cover something with a mattress and blanket. As the officer continued past, appellants interrupted these efforts and sat down on the object. A few moments later, he returned to find them sitting about 100 feet away from the object. These observations warranted the officer in making some inquiry about the nature and ownership of whatever appellants had brought to such an incongruous location. Without doubt, it was perfectly reasonable for him to take a closer look at the object. His consequent discovery that it was a safe caused appellants to bolt into the woods. Moreover, it appeared that someone had recently tempered with the safe, and several tools were lying on the ground next to it. These circumstances gave the officer ample reason to take the safe and blanket into custody. *Vauss* v. *United States*, —— U.S. App. D.C. ——, 370 F.2d 250, 251 (1966).

---

[6] The record belies the suggestion that the area might have been a junk yard or garbage dump where it would not have been strange to see several men trying to hide a safe under a new electric blanket.

The seizure did not entail a search or an arrest, and so no warrant was necessary. *Ker* v. *California*, 374 U.S. 23, 43 (1963). The safe had been left in *plain view*, only partly covered by an electric blanket, itself a rather improbable shroud. *Dorsey & Wright* v. *United States*, —— U.S. App. D.C. ——, 372 F.2d 928 (1967). Indeed, since appellants had moved a good distance away from the still undetected safe, and then disappeared when the officer scrutinized it, he could legitimately treat the safe as abandoned property. *Keiningham* v. *United States*, 113 U.S. App. D.C. 295, 307 F.2d 632 (1962), *cert. denied*, 371 U.S. 948 (1963). In short, the seizure of the safe and electric blanket invaded no right of privacy, person, or premises that would entitle appellants to silence its mention at trial. *Wong Sun* v. *United States*, 371 U.S. 471, 491-492 (1963). Officer Cooper not only acted well within his lawful authority—his response to this situation exemplifies conscientious and responsible law enforcement.

b. *There was probable cause to arrest appellants.*

A law enforcement officer has probable cause for an arrest if "in the particular circumstances, conditioned by his observations and information, and guided by the whole of his police experience, [he] reasonably could have believed that a crime had been committed by the person to be arrested." *Jackson* v. *United States*, 112 U.S. App. D.C. 260, 262, 302 F.2d 194, 196 (1962). It is a practical concept, *United States* v. *Jones*, 340 F.2d 913 (7th Cir. 1964), and as such it does not require that the officer know facts necessary to prove the commission of a crime. *Brinegar* v. *United States*, 338 U.S. 160, 172-173 (1949) (Clark, J.); *Husty* v. *United States*, 282 U.S. 694, 700-701 (1931). "The problem faced by the officer is one of probabilities—not certainties and not necessarily eventual truth." *Bell* v. *United States*, 102 U.S. App. D.C. 383, 387, 254 F.2d 82, 86, *cert. denied*, 358 U.S. 885 (1958). He need not have received a report as to *what* crime occurred so long as his investigation supports a reasonable

belief that the suspect has committed *a* crime. *Jefferson* v. *United States*, 121 U.S. App. D.C. 279, 349 F.2d 714 (1965); *Robinson* v. *United States*, 109 U.S. App. D.C. 22, 283 F.2d 508 (1960), *cert. denied*, 365 U.S. 830 (1961).[7] And the circumstances of this case "could well induce a reasonably prudent police officer to conclude that a larceny, robbery, housebreaking, or some similar offense had been . . . committed" by appellants. *Dixon* v. *United States*, 111 U.S. App. D.C. 305, 307, 296 F.2d 427, 429 (1961); *United States* v. *Zimble*, 318 F.2d 676 (7th Cir. 1963), *cert. denied*, 375 U.S. 868 (1963).

Acting upon information that several men had just brought a large object to the woods in an automobile and chased away curious children, Officer Cooper surprised appellants as they were trying to cover the object with a mattress and blanket, and observed them sit down upon it. He left for awhile, but returned to find them about 100 feet from the object. When appellants offered no plausible explanation for their conduct, he ascertained—merely by looking—that the object was a safe, with markings that indicated someone had recently attempted to break it open. These observations, combined with the presence of a screwdriver and wrench lying alongside the safe, made it entirely reasonable for him to surmise that it had been stolen. *Redmon* v. *United States*, 355 F.2d 407 (9th Cir. 1966). In addition, the abortive attempt by appellants to hide in the woods strengthened the inference that they were not the legitimate owners of the safe. *Cf. Adams* v. *United States*, 118 U.S. App. D.C. 364, 336 F.2d 752 (1964), *cert. denied*, 379 F.2d 977 (1965). Once the police officer found them again, he had a duty to detain them until he learned whether the safe had been stolen.

---

[7] An arrest does not become invalid simply because the obvious fruits of theft have to be connected later with the particular housebreaking or robbery. A recognition of this fact underlies the cases that evaluate probable cause "on the basis of the collective information of the police." *Smith* v. *United States*, —— U.S. App. D.C. ——, 358 F.2d 833, 835 (1966); *Williams* v. *United States*, 113 U.S. App. D.C. 371, 308 F.2d 326 (1962).

The appellants argue that they erased the cause for their immediate arrest by giving their names to the police officer. The law is otherwise. "When probable cause appears, a warrant is not required for an arrest in public, even where practicable." *Rouse* v. *United States*, —— U.S. App. D.C. ——, 359 F.2d 1014, 1016 (1966).

Finally, it must be remembered that this case involves "no problem of searching the house or any other place of privacy." *Brinegar* v. *United States*, 338 U.S. 160, 176 (1949). Despite appellants' efforts to conceal the safe, it remained in plain view. *Ellison* v. *United States*, 93 U.S. App. D.C. 1, 206 F.2d 476 (1953). As this Court recently stressed:

> "If policemen are to serve any purpose of detecting and preventing crime by being out on the streets at all, they must be able to take a closer look at challenging situations as they encounter them." *Dorsey & Wright* v. *United States*, —— U.S. App. D.C. ——, 372 F.2d 928, 931 (1967).

These considerations vitiate appellants' objection to the introduction of the transistor radio that was seized upon their arrest.

II. The trial court properly admitted fingerprint evidence that connected one of the appellants with the crime.

It is well settled that law enforcement officers may fingerprint a suspect before taking him to a magistrate. *Heideman* v. *United States*, 104 U.S. App. D.C. 128, 131, 259 F.2d 943, 946 (1958), *cert. denied*, 359 U.S. 959 (1959). And this Court has invariably ruled that such evidence is admissible, regardless of the length of delay in presentment.[8] *E.g.*, *Smith & Bowden* v. *United States*, 117 U.S. App. D.C. 1, 4, 324 F.2d 879, 882 (1963) (palm print); *Bynum* v. *United States*, 107 U.S. App. D.C. 109,

[8] Only incriminating statements extracted during a period of unlawful detention (and evidence found as a result of these statements) are excluded by *Mallory* v. *United States*, 354 U.S. 449 (1957).

274 F.2d 767 (1960) (fingerprints); *Mitchell* v. *United States*, 114 U.S. App. D.C. 353, 357, 316 F.2d 354, 358 (1963) (line-up identification); *Payne* v. *United States*, 111 U.S. App. D.C. 94, 294 F.2d 723, *cert. denied*, 368 U.S. 883 (1961) (identification).[9] Of course, the interval between fingerprinting and presentment raises no problems. *Mitchell* v. *United States*, 322 U.S. 65 (1944).

In this instance, police officers took Woodard's fingerprints several hours after his arrest, and later matched them with fingerprints found inside complainant's apartment. The sequence of this investigation abridged none of his constitutional or statutory rights.

III. There was sufficient evidence to support the jury's verdict that appellants had committed grand larceny.

(Tr. 179, 231)

Each appellant received identical concurrent sentences for separate convictions of housebreaking and grand larceny. The evidence amply supports their convictions for housebreaking.[10] This moots their contention that the prosecution elicited insufficient evidence of value to sustain their grand larceny convictions. *E.g.*, *Hirabayashi* v. *United States*, 320 U.S. 81 (1943); *Smith* v. *United States*, 122 U.S. App. D.C. 339, 353 F.2d 877 (1965); *Moore* v. *United States*, 117 U.S. App. D.C. 376, 330 F.2d 842 (1964); *Redfield* v. *United States*, 117 U.S. App. D.C. 231, 328 F.2d 532, *cert. denied*, 377 U.S. 972 (1964); *Payne* v. *United States*, 114 U.S. App. D.C. 10, 309 F.2d 231 (1962). The alleged deficiency of proof would obviously not have affected the jury's consideration of the housebreaking charges.

---

[9] As apparent from its language, and as construed by subsequent decisions, *Bynum* v. *United States*, 104 U.S. App. D.C. 368, 262 F.2d 465 (1959), applies solely to evidence obtained from an illegal arrest.

[10] Not only were appellants caught with the stolen goods, but Woodard's fingerprints were found at the scene of the crime.

In any case, there was ample evidence from which the jury could conclude that appellants had stolen property worth more than $100 from the complainant's apartment.[11] The complainant testified that his safe contained $270 in bills and a collection of coins, having recently placed $280 in the safe and withdrawn only $10 prior to the theft. Fortunately, appellants were interrupted before they could break into the safe. These facts justify the inference that the safe contained an amount of money exceeding $100 when it was stolen by appellants.[12] *Curley* v. *United States*, 81 U.S. App. D.C. 389, 160 F.2d 229, *cert. denied*, 331 U.S. 837 (1947).

IV. The trial judge correctly instructed the jury as to the permissible inference that could be drawn from the possession of recently stolen property.

(Tr. 176, 178, 179, 180, 233, 234, 237)

The trial judge carefully framed his instructions to include every request made by defense counsel (Tr. 176-180). For instance, counsel asked the judge to instruct the jury that they could infer guilt from prossession of recently stolen property only if they found "actual or constructive possession beyond a reasonable doubt." (Tr. 178). He readily agreed this was an essential ingredient, and so charged the jury.[13] In accordance with the explicit

---

[11] At the request of defense counsel, the trial judge gave complete instructions as to the lesser included offense of petit larceny (Tr. 179, 231).

[12] Had any money that complainant placed in his safe been missing, he undoubtedly would have mentioned it. Besides, appellants also stole a transistor radio and an electric blanket that complainant had just purchased for $29.

[13] The instruction on this point reads as follows:

There still remains for your consideration another principle of law and this is known as possession of recently stolen goods. If you find that the government has proved beyond a reasonable doubt that any one or more of these defendants had in his possession property recently stolen from the complainant's apartment, then you may, under the instruction that I will give you, infer there-

wishes of defense counsel, the judge did not mention that the jury should draw no inference from the failure of appellants to take the stand (Tr. 178-179). At the conclusion of the charge, defense counsel expressed their complete satisfaction (Tr. 237).

Taking a position contrary to trial counsel, appellants belatedly contend that the judge should have elaborated upon the portion of his charge dealing with the inference that may be drawn from possession of recently stolen property. But appellants should not be heard to repudiate the express judgment of competent trial counsel that the instruction fairly and accurately set forth the applicable law. See, *e.g.*, *Riveria* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 553, *cert. denied*, 385 U.S. 938 (1966); *McKnight* v. *United States*, 114 U.S. App. D.C. 40, 309 F.2d 660 (1962). Indeed, the lack of objection at the trial level ordinarily forecloses criticism of the judge's

---

from the guilt of such defendant or defendants as to the two counts here charged, *but you are not required to so infer.*

Now, with reference to the principle of law of possession of recently stolen goods, you are instructed that if you find that a defendant knowingly had in his possession in the District of Columbia, such possession being actual or constructive, any of the property recently taken from the complaining witness, Mr. Immel, and there has been a failure to explain such possession to your satisfaction, then you *may* infer therefrom the guilt of such defendant or defendants of the charge.

If, however, you find there has been explanation which satisfies you, then you would not so infer.

In this connection you are further instructed as a matter of law that possession means not merely physical possession but includes constructive possession as well.

Constructive possession occurs when a person does not have within his hands or grasp the article in question but does have dominion and control over the article.

As I have said to you, if you find that the government has proved possession, actual or constructive, as to any one or more of these defendants and there has not been satisfactory explanation thereof, *then you may, if you deem it wise to do so, infer* therefrom the guilt of the defendant or defendants as to count one, and as to count two or either.

I think I have said to you that possession, whether it be actual or constructive, must be proven beyond a reasonable doubt. (Tr. 233-234) (emphasis added).

instructions upon appeal. *E.g.*, *Kelly* v. *United States*, —— U.S. App. D.C. ——, 361 F.2d 61 (1966); *Robertson* v. *United States*, —— U.S. App. D.C. ——, 364 F.2d 702 (1966); *Williams* v. *United States*, 116 U.S. App. D.C. 131, 321 F.2d 744, *cert. denied*, 375 U.S. 898 (1963).

In any event, appellate courts have invariably sustained the type of instruction given by the trial judge. *E.g.*, *(Fletcher) Smith* v. *United States*, —— U.S. App. D.C. ——, 359 F.2d 243 (1966). This instruction comports with the one approved by *Bray* v. *United States*, 113 U.S. App. D.C. 136, 141, 306 F.2d 743, 748 (1962), fully meeting the standards enunciated in that opinion: "[T]he instruction properly noted that although appellant's guilt might be inferred from his possession of the stolen car, the jury could not draw such an inference if he had satisfactorily explained his possession. . . . [F]airly read, the instruction did not place the burden of explaining possession upon appellant." And the *Bray* decision represents a rather narrow view of the "rule established by a myriad of decisions that possession of recently stolen goods will support an inference that the possessor is guilty of the theft." *Battaglia* v. *United States*, 205 F.2d 824, 827 (4th Cir. 1953). *E.g.*, *McNamara* v. *Henkel*, 226 U.S. 520, 524-525 (1912) (Hughes, J.); *Travers* v. *United States*, 118 U.S. App. D.C. 276, 335 F.2d 698 (1964); *McAbee* v. *United States*, 111 U.S. App. D.C. 74, 294 F. 2d 703 (1961), *cert. denied*, 368 U.S. 961 (1962); *Gilbert* v. *United States*, 94 U.S. App. D.C. 321, 215 F.2d 334 (1954).[14] Even had the issue not been waived below, the trial court's instructions contain nothing that can be magnified into reversible error.

---

[14] The fact that appellants did not testify provides no basis to distinguish this case from prior decisions that have approved the inference-from-possession instruction.

V. The prosecution introduced sufficient evidence to sustain a jury finding, under the proper standard, that appellants had possession of the stolen property.

(Tr. 100, 228, 231, 234, 235)

A park policeman observed both appellants "attempting to cover something with an old bed mattress and a woolen blanket." (Tr. 100). When the officer approached, they sat "down on the mattress that was covering" the top of this object, which turned out to be a stolen safe. From this evidence alone, the jury could reasonably infer that appellants had exclusive possession of the safe, whether possession be defined in terms of joint or concerted.[15]

The trial judge correctly charged the jury, as requested by counsel, that the prosecution had to prove actual or constructive possession of the safe by each appellant in order to raise an inference of his guilt.[16] The semantic quarrel with this instruction should be dismissed as frivolous, as well as untimely.[17]

---

[15] *Cf. United States* v. *Luciano*, 343 F.2d 172 (4th Cir.), *cert. denied*, 381 U.S. 945 (1965); *United States ex rel. Lupo* v. *Fay*, 332 F.2d 1020 (2d Cir. 1964); *Gregory* v. *United States*, 309 F.2d 536 (2d Cir. 1962).

[16] In addition, the trial judge repeatedly stressed that the jury could return different verdicts as to each defendant (Tr. 228, 231, 234-235).

[17] In the absence of prejudice, it cannot be said that the trial court's refusal to permit a last-minute change of counsel abridged Johnson's statutory rights (Tr. 3-4). The trial court acted well within its discretion, and Johnson received commendable representation. *Brown* v. *United States*, 105 U.S. App. D.C. 77, 264 F.2d 363 (*en banc*), *cert. denied*, 360 U.S. 911 (1959).

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgments of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS,
LEE A. FREEMAN, JR.,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 262050 650